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OCTOBER TERM, 1896.

EX PARTE THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, Petitioner.

PETITION FOR WRIT OF CERTIORARI requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination the case of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, vs. NELLIE PHINNEY, Executrix of the Last Will and Testament of Guy C. Phinney, Deceased, Defendant in Error, or, as an alternative relief, that said Circuit Court of Appeals be required to reinstate and proceed to try and adjudge said case according to law and the right thereof.

BRIEF OF PETITIONER.

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BRIEF OF PETITIONER.

STATEMENT.

The Mutual Life Insurance Company of New York, a corporation chartered as such by a special act of the Legislature of the state of New York, in September, 1890, insured the life of Guy C. Phinney for one hundred thousand dollars for the term of twenty years. At the time of taking the insurance, Phinney was a citizen and resident of the city of Seattle, state of Washington. The insurance company had complied with the laws of that state requiring foreign corporations transacting business therein to file with the Secretary of State a copy of its articles and to appoint an agent at the principal place of

business of the company in the state. This statutory agent was also the general agent of the insurance company in the state and was engaged in procuring insurance for the company. The insurance company also had a general office at San Francisco for the conduct and management of its business affairs on the Pacific Slope. The application for insurance and the physical examination of the applicant were made at Seattle. The application was delivered to the agent of the company there and he transmitted the same to the general agent at San Francisco, who forwarded it to the principal office of the company in New York City, and in due course the policy of insurance was transmitted by mail to the San Francisco agent and by him to the agent at Seattle, who there delivered it to Phinney upon receipt of the first annual premium of $3,770.

The laws of the state of Washington confer upon foreign corporations authority "to do and perform every act and transact every kind of business within this state in the same manner and to the same extent as corporations incorporated and organized under the laws of this state are authorized to do under the laws of this state." (*See Petition p. 3.*)

The application for insurance and the endorsements upon the policy were made a part of the contract. In the application it was provided that the policy "shall not take effect until the first premium shall have been paid and the policy shall have been delivered during my continuance in good health;" and also that "This application is made to The Mutual Life Insurance Company of New York subject to the charter of the company and the laws of the state of New York." Among the endorsements on the policy is the following: "Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere

when taken in exchange for the company's receipt, signed by the President or Secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is hereby expressly waived. * * * This policy shall become void by the non-payment of premium."

Shortly before the annual premium succeeding that paid upon the delivery of the policy became due, the company's receipt, duly signed by its President, was transmitted to the agent of the company at Seattle to be exchanged for the premium becoming due and payable. The insured was informed of the fact, and conferred with the agent respecting it, and expressed his inability to make payment; and some weeks following the due date of the premium, the receipt was returned to the home office on account of its non-payment, and the policy was entered upon the books of the company as forfeited. Neither payment nor tender of payment was ever made of any premium save that paid upon the delivery of the policy in September, 1890. On the 12th day of September, 1893, Phinney died, at Seattle. Shortly after the forfeiture of the policy, the insured gave it to the agent of the insurance company, as claimed by the latter because it was a forfeited policy, but by the defendant in error as a loan.

Upon the qualification of the defendant in error as the executrix of her deceased husband's will, she caused an inventory of the estate to be filed for appraisement, including therein another life insurance policy, but made no inquiry concerning the one in dispute until nearly a year afterward. Upon making claim for the insurance and offering proof of the death of the insured, and being advised by the insurance company that the policy had been forfeited for non-payment of premium, this action was brought by the executrix.

The complaint set up the policy of insurance, including the application and endorsements upon it, which were made a part of the policy. Performance by the insured of all the conditions of the contract was averred but controverted by the defendant company.

The statute of New York quoted in the Petition provides that "no life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of the non-payment of any annual premium or interest or any portion thereof excepting as hereinafter provided." The amendment of said statute provided that the affidavit of anyone authorized to mail the notice that the same was duly addressed to the person whose life was insured should be presumptive evidence of the notice having been given.

The Circuit Court instructed the jury that there was no evidence to warrant a finding that more than the first premium had been paid, but there was positive evidence that no further payment had been made of such significance as to cause him to take that question from the jury. The jury were instructed, however, that the policy was a New York contract, dominated and controlled by the laws of that state, and that unless notice had been given in strict compliance with the laws of the state of New York the policy remained alive, regardless of non-payment of premiums, and that tender of delinquent and unpaid premiums was not required before the commencement of action nor need such tender be made upon the trial. The jury were further instructed that from the verdict, if found in favor of the executrix, they could deduct the amount of such premiums. The verdict went against the insurance company and judgment was rendered for $97,012.84.

A writ of error was sued out from the Circuit Court of Ap-

peals of the Ninth Circuit, and lodged with the clerk of the Circuit Court, who, upon his fees in the amount of $211 being paid, transmitted a full and complete transcript of the record, annexed to the writ, to the office of the clerk of the Circuit Court of Appeals, agreeably to its mandate.

Following the issuance of the writ from the Circuit Court of Appeals, and on the same day, a citation was issued out of the Circuit Court of Appeals, service of which was admitted as follows: "Service of the within citation and the receipt of a copy thereof admitted this 14th day of December, A. D. 1895, S. Warburton, A. F. Burleigh, attorneys and counsel for Nellie Phinney, as executrix of the last will and testament of Guy C. Phinney, deceased."

The petitioner, desiring a supersedeas, on the same day lodged with the clerk of the Circuit Court a copy of the writ upon which the following endorsement was made: "Received a true copy of the foregoing writ of error for defendant in error. Dated this 14th day of December, 1895, A. Reeves Ayres, Clerk U. S. Circuit Court for the Ninth Circuit, District of Washington, by R. M. Hopkins, Deputy Clerk."

Rule 14 of the U. S. Circuit Court of Appeals prescribes the duty of the clerk in making return to a writ of error as follows:

"1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, opinion or opinions of the court, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

"2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record the original writ of

error and citation, or citation issued in the cause, and a certificate under seal stating the cost of the record and by whom paid."

Both these provisions of the rule were complied with by the clerk of the Circuit Court. He did not, however, place upon the writ of error a written endorsement of the filing thereof. A motion to dismiss the writ of error was made in the Circuit Court of Appeals which upon the following ground was sustained. "2. Said writ of error was not filed in the court below."

Before the hearing of the motion to dismiss, an affidavit of the clerk of the Circuit Court was filed in the Circuit Court of Appeals, stating that the writ of error had, during usual business hours, been brought to his office by the attorney of the petitioner and delivered to him with the request that it be filed and its mandate obeyed; that he had obeyed its mandate, as he understood it, by making a return in conformity to the rule of the Circuit Court of Appeals; that it had been the uniform rule from the organization of the court to make no endorsement of filing upon a writ of error issuing out of the appellate court; and that, if permitted, he would make written endorsement of filing upon it as of the date he received it. Counsel for petitioner confirmed by affidavit the statement of the clerk. All fees were paid by the petitioner and the record was lodged in the office of the Circuit Court of Appeals within the statutory time. The Circuit Court of Appeals dismissed the writ of error because it had not been filed by the clerk of the Circuit Court. The court was divided in opinion, Judge Gilbert writing a dissenting opinion. Petition for rehearing agreeably to the rules of the Circuit Court of Appeals was filed. The same was overruled without written opinion.

Upon the foregoing abbreviated statement of facts, which

are more fully set forth in the petition for certiorari or alternative relief, the petitioner asks this court to grant a writ of certiorari or afford such alternative relief as may be appropriate.

ARGUMENT.

Recognizing that the authority conferred by Sec. 6 of the Act of March 3, 1891 (*26 Stats. at Large, 826*), upon this court for requiring the record and cause to be sent up to it for its consideration is exercised sparingly and with caution, only in cases of gravity and general interest or in order to secure uniformity of decision, we offer the following reasons why the writ of certiorari, or other appropriate relief, should be afforded in this case.

Primarily, we present the question of jurisdiction. A case involving, as this does, a large amount of money, many complicated and some unsettled legal questions, is one of gravity and more than individual interest. When, however, in such a case, appeal is denied without fault of the party seeking it, the case assumes peculiar gravity, and comes within the category of cases this court should entertain both for the purpose of protecting the right of appeal and securing a uniformity of practice and decision. The petitioner did all the law required of it by lodging the writ of error with the clerk of the Circuit Court, requesting its filing, making payment of all fees and charges as estimated by the clerk, requesting the clerk to obey the mandate of the writ, and receiving the consent of that officer to do so.

DOES THE WRITTEN ENDORSEMENT BY THE CLERK UPON THE WRIT CONSTITUTE THE FILING CONTEMPLATED BY LAW, OR IS SUCH WRITING INDISPENSABLE TO THE JURISDICTION OF THE APPELLATE COURT?

Was it intended that the Federal appellate courts should be without jurisdiction, and appealing parties remediless, if a clerk of a Circuit Court, though having correctly performed every duty required of him by the mandate of a writ of error, through ignorance, mistake or inadvertence fails to place the file mark upon it?

On the contrary, we respectfully submit that the lodging of the writ of error with the clerk for the purpose of the return constitutes the filing contemplated by law. When the writ of error is placed in the custody of the clerk of the Circuit Court at his office during usual office hours, and he is requested to make return and accepts his fees from the appealing party for that purpose, such writ is filed in the clerk's office. An endorsement of filing affords the usual and convenient proof of what has been done, but it does not constitute the filing nor does it afford the only proof thereof.

"Careful practice would require that the clerk receiving the papers should endorse upon them the date of the filing; but such endorsement is not the filing, it is simply evidence of such filing. A paper is filed when it is delivered to the proper officer, and by him received to be kept on file."

Powers v. State, 87 Indiana, 144-148.

"We think that a certificate of the clerk, entered upon the brief at the time it is filed, is the best evidence of such filing, but that it is not necessary to the act of filing. 'A paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file.' 13 Vin. Abr. 211; 1 Bouv. Law Dict. 568. The written memorandum of the clerk is but the

evidence of the delivery to him of the paper intended to be filed. In its absence, other testimony may properly be admitted to show that such paper was filed."

Peterson v. Taylor, 15 Georgia Rep., 483, (60 Am. Dec., 706.)

"All the party can do in order to have his deed filed, is to take it to the officer, and deliver it to the recorder. When he has done this, he cannot be charged with any default or negligence. The deed is then, in contemplation of law, filed for record."

Cook v. Hall, 1 Gilman, (Ill.), 575, 579.

"Filing a paper, * * * * means placing and leaving it among the files. The memorandum endorsed by the officer in whose custody it is placed, is merely evidence of the filing, and not the filing itself."

1 Bradwell, (Ill.), 145.

See *Dissenting Opinion* of Judge Gilbert, Circuit Judge (*Record, p. 446*), in harmony with the foregoing authorities, clearly demonstrating that the writ of error had been duly filed and the Circuit Court of Appeals was possessed of jurisdiction of the case.

In the recent case of *Wheeling Pottery Company v. Levi, 19 Southern Reporter, 752, (48 La.)*, it is said:

"The filing (of the petition) was overlooked by the clerk. It was handed to him in his office to be filed. It was received by him, acted upon, and was to be kept on file, and it was a document of his office. Having been placed by the attorney in the hands of the filing officer in his office, to be filed, and it having been acted upon, as already stated, and the contemporaneous facts rendering it evident that all was done in the utmost good faith, and that the omission was owing to a mere inadvertence of the officer, we think that the plaintiffs complied with the law to every intent and purpose. The absence of the 'file mark,' under the circumstances, cannot operate to his

prejudice. 'Filed' is the best evidence that the document is of record, but it is not always and under all circumstances the only evidence that will prove that a petition is of record, when, owing to clerical error, it is not expressly indorsed."

We make the following quotations from opinions of courts upon the same subject:

"But where the law requires or authorizes a party to file it (a paper) it simply means that he shall place it in the official custody of the clerk. That is all that is required of him, and if the officer omits the duty of endorsing upon it the date of filing, that should not prejudice the rights of the party."

Holman v. Chevaillier, 14 Texas, 339.

"We are of opinion, that the word 'filing,' * * * does not include the endorsing and indexing * * * but that a mortgage is filed within the meaning of the statute, when it is delivered to and received and kept by the proper officer, in his office."

Gorham v. Summers, 25 Minn. 81, 86.

This court, in the case of *Wabash & Western Ry. Co. v. Brow, 164 United States, 271*, exercised jurisdiction and granted a writ of certiorari in a case similar in principle to that before the court. Brow commenced an action in a state court, against the Wabash & Western Ry. Co., for personal injuries, making service upon a person he claimed authorized to receive process. The cause was, on the application of the defendant, removed to a federal court, where a motion to dismiss for lack of service of original process was refused because adjudged waived by a general appearance, and the defendant was required to answer. Upon writ of error from the Circuit Court of Appeals the decision of the Circuit Court was affirmed. Upon petition, a writ of certiorari was issued from this court and the judgment of the Circuit Court of Appeals set aside. In that case the lower court

assumed jurisdiction without having it, and in this case it refused to exercise jurisdiction when possessed of it.

In contemplation of the federal statutes and decisions, the writ is filed by lodging it with the clerk for the purpose of a return. We recognize the rule as first authoritatively and forcibly stated in the case of *Brooks v. Norris, 11 Howard, p. 207*, where the court says:

"The Act of 1789, chap. 20, s. 22, provides that writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of. The writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of congress must be calculated accordingly. The day on which the writ may have been issued by the clerk, or the day on which it is tested, are not material in deciding the question."

The section of the Judiciary Act referred to (*1 Stats. at Large, p. 84*), as well as the same statute incorporated in the Revised Statutes of the United States, in Secs. 997, 998, 999, 1000, 1007 and 1008 is no less conspicuous than Rule 14 of the Circuit Court of Appeals for the Ninth Circuit in omitting the word "file" or the term "filing" from every provision of the statute that relates to writs of error. The language of the original Judiciary Act, Sec. 22, is that "decrees and judgments" may be re-examined and reversed or affirmed "upon a writ of error, whereto shall be annexed and returned therewith at the time and place therein mentioned, an authenticated transcript of the record, an assignment of errors and prayer for reversal, with a citation to the adverse party signed by the judge," etc. And later along in the same section, "And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of."

Section 1008 of the Revised Statutes contains the same limitation as follows:

"No judgment, decree, or order of a circuit or district court, in any civil action, at law or in equity shall be reviewed in the Supreme Court, on writ of error or appeal, unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment, decree or order."

The court must look outside of both the language of the statutes and the rule to find the word "file" or the term "filing" or any similar expression. We respectfully submit that a technical filing in the narrow sense of that term at no time entered into the contemplation of the writers of the opinions of the Supreme Court where they held that a writ of error was not sued out or in the language of the statute "brought" until filed in the office of the clerk of the trial court. What they were seeking to do was to determine a time from which the control of the trial court ceased, and from which the period of limitation on appeal or writ of error began to run. They properly held that neither the act of issuing the writ from the higher court nor the attestation upon the writ fixed this time, but that placing the writ in the hand of the proper officer for obeying its command determined, viz., the filing or lodging of the writ of error with the officer whose duty it was to obey its mandate.

That such is the meaning of the statute, and such must have been the view of the court, is made manifest by Sec. 1007 of the Revised Statutes relating to supersedeas. That section provides:

"In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment

complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterwards with the permission of a justice or judge of the appellate court."

What is expressed by the word "lodge" in this section, we contend is exactly what is meant in the opinions of the Federal courts. The writ of error is simply lodged with the clerk for the purpose of making a return by him upon it. It is in his custody transiently and temporarily. The lodging of the writ with the Clerk of the Court is doing all it is possible for the party appealing to do to make his right complete. If this were not true, a delay on the part of the clerk might rob the appellate court of its jurisdiction, or an honest misconception—as in this case—have the same effect.

We call attention to some of the opinions of this court, cited in the majority opinion of the Circuit Court of Appeals, in order to show that in the view of the judges it was the service upon the clerk of the trial court or a lodgment with or delivery to him of the writ of error that constituted the filing. An examination of the leading case of *Brooks v. Norris, 11 How., 207*, will show that no other sense of the term "filing" was in the court's mind. The language of Chief Justice Taney is that the writ of error is not brought until it is filed *in* the court which rendered the judgment, not *by* the court.

This meaning is very fully borne out by a reference to the case of *Mussina v. Cavazos, 6 Wallace, 355*, wherein Justice Miller defines what is necessary to confer jurisdiction upon the appellate court so far as the service of the writ of error is concerned. At page 358, he says:

"When deposited (the writ of error) with the clerk of the

court, to whose judge it is directed, it is served; and the transcript which the court sends here is the return to the writ, and should be accompanied by it."

Here it will be observed, that the deposit with the clerk of the lower court perfects the service and gives jurisdiction to the appellate court.

In the case of *Brandies v. Cochrane, 105 U. S. Rep., 262*, the same idea is borne out by showing how an appeal may be perfected. No formal order granting the allowance of an appeal was made, but the circuit judge approved the bond for an appeal and signed the citation. The opinion says:

"The bond was on the same day filed with the clerk, and the citation served on the 18th of August. * * * * The circuit court,, by taking the security and signing the citation allowed an appeal. No formal order of allowance was necessary."

It will be observed the court in speaking of the filing of the bond does not state it was filed *by* the clerk but it was filed *with* him. In other words, it was lodged with him for his official action.

So, in the case of *Scarborough v. Pargoud, 108 U. S. Rep., 567*, the question was whether the writ of error was brought within the two years, and in fixing the date for the computation of the limitation, the court says:

"The final decree in this case was rendered on the 13th day of July, 1878, and while the writ of error was allowed by the Chief Justice of the Supreme Court of Louisiana, and a bond approved and citation signed on the 5th day of July, 1880, the writ of error was not actually issued until the 14th, and the copy was not *lodged* in the clerk's office until the 16th of that month."

In this quotation the court expresses exactly what is meant by the filing with the clerk, not the act of the clerk in placing

his file endorsement upon the writ, but that the copy was not lodged in the clerk's office until the 16th of that month.

Again, in the case of *Polleys v. Black River Improvement Company, 113 U. S. Rep., 83,* the court says:

"Though the writ of error in this case seems to have been issued by the clerk of the Circuit Court of the United States on the 10th day of May, 1884, and is marked by him for some reason as filed on that day, it is marked by the clerk of the court to which it is directed, viz., the Circuit Court of La Crosse County, as filed on the 29th day of that month. It is not disputed that this is the day it was filed in his office."

It will be observed it does not state this was the day it was filed *by* him, but in the sense of the other decisions it was the day on which it was filed *in* his office.

Again, in the case of *Credit Company v. Arkansas Central Railway Company, 128 U. S. Rep., 261,* the court, after setting forth that the same rule is applicable to appeals as to writs of error, proceeds to state when an appeal is taken, as follows:

"An appeal cannot be said to be 'taken' any more than a writ of error can be said to be 'brought,' until it is, in some way, presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the appellate court. This is done by filing the papers, viz., the petition and allowance of appeal, (where there is such a petition and allowance) the appeal bond and the citation. In Brandies v. Cochrane, it was held that in the absence of a petition and allowance, the filing of the appeal bond, duly approved by a justice of this court was sufficient evidence of the allowance of an appeal, and was a compliance with the law requiring the appeal to be filed in the clerk's office."

Were no further proof furnished of the filing of the writ than the supersedeas bond (See *Record, pages 392, 393, 394*) approved by the presiding judge, that should be sufficient. It will be

observed that Sec. 1007 of the Revised Statutes provides that where a writ of error may be a supersedeas, such supersedeas may be obtained by serving the writ of error, by "lodging" a copy thereof for the adverse party in the clerk's office, where the record remains, within sixty days, etc. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law as aforesaid within sixty days after the rendition of such judgment, or afterwards with the permission of a justice or judge of the appellate court.

It will be seen by page 394 of the printed record that such supersedeas bond was given on the day the writ of error was issued; upon the same day a copy of it was lodged in the clerk's office pursuant to Sec. 1007; and that the same judge who upon that day signed the citation, reciting that a writ of error had been filed in the clerk's office, approved the supersedeas bond, which could only in the orderly and proper course be done after the filing of the writ of error and the lodging of a copy with the clerk for the defendant in error.

THE STATUTE OF JEOFAILS IS APPLICABLE IN THIS CASE.

To prevent the sacrifice of rights to constructions so technical as adopted in this case, Sec. 32 of the Judiciary Act of 1789 (*Sec. 954 of the Revised Statutes of the United States*), was enacted, which is as follows:

"No summons, writ, declaration, return, process, judgment or other proceeding in civil causes, in any court of the United States, shall be abated, arrested, quashed or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the

party demurring specially sets down, together with his demurrer, as the cause thereof."

Mr. Justice Story, *in 1st Gallison, at page 22*, in applying this statute, says:

"By the judiciary act of 1789, ch. 20, s. 32, it is enacted, that all the courts of the United States, may, at any time, permit either of the parties 'to amend any defect in the process of pleadings, upon such conditions, as the said courts respectively shall, in their discretion, and by their rules, prescribe.' The language of this section is sufficiently comprehensive to sustain the application for amendments in any cases before the court; but it has been attempted to be restricted to causes of *original*, and not to be extended to causes of *appellate* jurisdiction. But we find no such distinction in the statute; and even in appellate courts, proceeding according to the course of the common law, defects apparent upon the record may be amended, when they come within the general purview of statutes."

1st Gallison Rep., pp, 22, 23.

In *Warren v. Moody, 9 Fed. Rep., 673*, Pardee, C. J., in construing this statute, says:

"It (the case) came up for hearing at last term, when an amendment of substance was allowed to the original bill, and the cause continued to allow the defendant to meet the amended bill by motion to strike out or answer or plead, as counsel might advise. The defendant moves to strike out the amendment, and this motion presents the question whether it is allowable on appeal in equity to permit amendments to pleadings."

In *Kennedy v. Georgia State Bank, 8 How. 610*, it is said:

"There is nothing in the nature of an appellate jurisdiction, proceeding according to the common law, which forbids the granting of amendments. And the thirty-second section of the judiciary act of 1789 (now Rev. St. Sec. 954), allowing

amendments, is sufficiently comprehensive to embrace causes of appellate as well as original jurisdiction."

And then the court cites *Anon., 1 Gall. 22*, in which case Justice Story, in a forcible argument, holds that amendments may be allowed in appellate courts.

Under this Statute of Jeofails the omission of the endorsement of filing should have been over-looked, or the clerk of the Circuit Court permitted to make the same as of the time he received the writ.

The judgment appealed from was rendered October 17th, 1895. (See *Record, p. 92.*)

The writ of error bears date December 14, 1895, (See *Record, p. 395*), and was received by the clerk the same day (*Record p. 400*), and was returned January 4th, 1896.

PROOF OF THE FILING OF THE WRIT OF ERROR IS SUPPLIED IN THE RECORD INDEPENDENTLY OF AN ENDORSEMENT OF FILING BY THE CLERK OF THE CIRCUIT COURT.

By the timely and full return of the Clerk of the Circuit Court, annexed to the writ of error, it appears that a complete record was in the Circuit Court of Appeals, and the costs of the transcript had been paid by plaintiff in error (*Record, p. 400*). By the citation, reciting that the writ of error had been filed in the office of the Clerk of the Circuit Court, by the showing in the record that a copy of the original writ had been duly lodged in the office of the Clerk of the Circuit Court, by plaintiff in error (*Record, p. 398*), and by the supersedeas bond (*Record, p. 394*), and by the full showing of the affidavits (*Records, pp. 412, 414, 418*), it is made to definitely and certainly appear that the omission of the written endorsement of filing was supplied.

This state of facts brings the case under the rule laid down

by this court in *Ex Parte Parker, 120 United States, p. 737.* That case was dismissed from the Supreme Court of Washington Territory for the reason that evidence was not certified by the clerk of the trial court. This court looked beyond the certificate into the papers or documents contained in the record, which disclosed that all the evidence was before the Territorial Supreme Court, and said:

"It appears from these documents very clearly that nothing was ommitted in the transcript by direction of attorneys except the subpœnas; that all the testimony introduced by the parties on the trial before the referee was returned into the Supreme Court, duly certified as such; and that that constituted all the evidence introduced by the parties on the trial in the court below, in accordance with Sec. 451 of the Territorial Code: because it appears by the degree sought to be appealed from that the cause was finally heard upon the report of the referee, the exceptions thereto of the defendant Parker being overruled, and the report of said referee being in all things confirmed, except as modified and altered by the findings and conclusions of the court itself. It thus appears with certainty that the transcript contained all the evidence introduced by the parties on the trial in the court below."

IN VIEW OF THE UNCERTAINTY OF THE DECISIONS AS TO THE LAW CONTROLLING THE PERFORMANCE OF CONTRACTS LIKE THE ONE IN CONTROVERSY, THE OPINION OF THIS COURT WILL BE OF PUBLIC IMPORTANCE AND TEND TO SECURE UNIFORMITY OF DECISION.

The court instructed the jury that the policy was a New York contract and its provisions were dominated and controlled by the statutes of that state relating to insurance companies, and that compliance with such statutes was indispensable to a forfeiture of the policy for non-payment of the premiums. (*Record, pp. 349-351.*)

It is true the application recites that it was made subject to the charter of the company and the laws of New York, and that payments are to be made at the home office of the insurance company. The policy, however, provides that payments will be received anywhere in exchange for the company's receipt signed by its president (*Record, p. 3.*) In the provisions contained on the back of the policy, which are made a part of the contract, it is mutually agreed that notice is given and accepted that every premium is due at the date named in the policy, and that any further notice is expressly waived, and that the policy shall become void by non-payment of premiums, (*Record, pp. 3-4.*) It is agreed the policy shall not take effect until the first premium shall have been paid by the assured and the policy delivered to him during his continuance in good health (*Record, p. 6.*) The application was made, the medical examination had, the first premium paid to and the policy delivered by the agent of the insurance company at Seattle, Washington. The insurance company was, at the time transacting business in the State of Washington, having complied with its statutes. The laws of Washington gave unrestricted freedom of contract to both parties. It is thus seen the transaction had its inception in Washington and became a contract in that state; that the acts essential to bring it into being as an agreement were by both parties performed in Washington; that the parties thus interpreted the policy as a Washington agreement, and that the renewal receipt was placed in the hands of the agent at Seattle to exchange for the subsequent premium. The case in each of the elements going to determine where the contract was executed and by what law it should be governed is substantially like that of *Equitable Life Assurance Society v. Clements, 140 U. S., p. 226,* where Justice Gray substantially summarized the case as follows:

The assured was a resident of Missouri, and the application

was signed there; the policy was executed at the company's office in New York and provided that the contract is set forth in the application and policy taken together; the application declares the contract shall not take effect until the first premium has actually been paid during the life-time of the assured; that two premiums were paid in Missouri; that the answer admits the payment of the premiums; and that the petition alleges the policy was delivered in Missouri to the assured; and then says,

"Upon this record the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri; and consequently that the policy is a Missouri contract and governed by the laws of Missouri."

Equitable Life Assurance Society v. Clements, 140 U. S., 232.

Unrestricted freedom of contract is conspicuously made manifest in this policy. Whatever else may be doubtful there is no uncertainty left as to the intention of the parties in this respect. They agree that the notice contained in the policy is given and accepted by the delivery and acceptance of the policy, and expressly waive any other notice, and declare the contract shall become void by non-payment of premiums. This freedom of contract was guaranteed by the law of the state where the contract was made.

In the case of *Liverpool and Great Western Steam Co. v. Phenix Ins. Co., 129 U. S. 397*, the court lays down the following rule:

"This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence of authority, the general rule, that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a

contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties when entering into the contract clearly manifest a mutual intention that it shall be governed by the law of some other country." P. 458.

The Brantford City, 29 Fed., 373, is forcibly in point. A contract was made at Boston with local agents of the British Steamship Company, by the terms of which libelants were to ship cattle on a British steamer from Boston, and deliver them at Deptford, England, for a freightage of eighty-five shillings sterling per head. The court says:

"2. The defendants contend, however, that, inasmuch as the cargo was taken on board a British ship, and as the bill of lading was signed by a British master, for transportation to England, the stipulations of the bill of lading exempting the ship from liability for negligence and from loss by death, however occasioned, afford a complete defense; because such stipulations are valid by the laws of England. * * * The question presented is a very important one. All the steamship lines, whether domestic or foreign, that sail from this port, insert in their bills of lading substantially the same conditions. Considering the number and the magnitude of the shipments by these lines, and the very diverse views found in the text-books and decisions upon this branch of the conflict of laws, I have deferred a decision of the cause until able to give the questions involved something, at least, of the consideration their importance demands. The conclusion to which I have come is that our law must prevail, whether the question be viewed as a question of responsibility for a tort or for the construction and validity of the exceptions in the bill of lading, in a conflict of laws; or as a question of evidence and procedure; or as a question of comity as related to our national policy."

Cox v. United States, 6 Pet., 83, 172, 203;
Scudder v. Union Nat'l Bank, 91 U. S., 406;
The Pennsylvania Co. v. Wm. Fairchild, 69 Ill., 260;
McDaniel v. The Chicago & N. W. Ry. Co., 24 Iowa, 412.

THE PARTIES TO THE CONTRACT INTERPRETED IT AS A WASHINGTON CONTRACT.

Doubt as to the policy being a Washington contract should be solved by the interpretation the parties themselves placed upon it. In addition to the application being made and the examination had in Washington, the premium paid and the policy delivered, and the insured becoming a member of the association there, we have the further fact that when the second premium became due the receipt for it, signed by the President of the insurance company, was sent to Seattle to be exchanged for the premium. The insured upon payment being demanded of him there by the agent, stated his inability to make payment of the premium. After the lapse of some days, the receipt was returned and the policy forfeited on the books of the company.

Record, pp. 260, 227-229.

The court instructed the jury there was positive evidence the insured did not pay more than the first premium.

Record, p. 353.

The fact that the insured did not tender nor the company demand the premium due September 24th, 1892, affords a demonstration that the parties interpreted the contract as made in Washington, and forfeiture resulted from non-payment according to their express stipulation.

In *Railroad Co. v. Trimble, 10 Wallace, 367*, the court says:

"It was referred to in the argument as showing the construction put by the parties upon the deed of Howe to Trimble of the 9th of July, 1844. Where there is doubt as to the proper construction of an instrument this feature of the case is entitled to great consideration." (*Page 377.*)

Nickerson v. A., T. & S. F. R. R. Co., 17 Fed. 409.

The State of New York has a declared statutory policy respecting insurance companies transacting business within her boundaries. In some particulars it is restrictive and severely penal. The State of Washington, doubtless owing to her remote and somewhat isolated situation, as an inducement to population, capital and business enterprises, adopted the same policy of freedom of contract with domestic and foreign corporations as accorded to natural persons. The policy of New York cannot displace that of Washington within the latter state. If the place of the law governing the performance of a contract is uncertain and suit is brought upon it in the state where it was made, and by the policy of the laws of that state the express stipulations of the contract are valid, that fact should cause a court to decide the contract to be performed under the laws of that state rather than under the laws of another government where such stipulations must be regarded as illegal or the public policy of the government defeated.

In *Mutual Ben. Life Insurance Co. v. Robison, 54 Fed. Rep., 580,* a New Jersey insurance company insured a citizen of the state of Iowa. The application was made in Iowa. The insurance was solicited in Iowa, where the application and examination were made. The application was forwarded by the company's agent to Newark, New Jersey, where the policy was issued. The application for the policy stated: "That such contract shall at all times and places be held and construed to have been made in the city of Newark, New Jersey, and this policy does not take effect until the first premium shall have been actually paid." The premium was paid and the policy delivered in Iowa. If a New Jersey contract, the company was not liable. If an Iowa contract, it was liable, because the Iowa statute made the solicitor and medical examiner agents of the insurance company, while the New Jersey statute did not. The court at pages 584, 588, says:

"We are, therefore, justified in holding that unless the clause in the application (with reference to construing the contract as made in New Jersey) shall take the case out of the rule as clearly established with reference to the point under consideration, the contract set out in the petition herein, must be construed by the laws of the state of Iowa. * * * We are, then, justified in holding that so far as the Iowa statute above quoted may apply to the contracts of insurance at bar, the Iowa law is the law which is to govern and furnish the rule of construction, 'anything in the application or policy to the contrary notwithstanding,' and a waiver thereof, as claimed by plaintiff, is ineffectual."

Wall v. Equitable Life Assur. Soc., 32 Fed., 273.
Berry v. Indemnity Co., 46 Fed., 439.
Equitable Life Assur. Soc. v. Winning, 58 Fed., 541.

THE INSURED DID NOT KEEP THE POLICY ALIVE BY THE PAYMENT OF ANNUAL PREMIUMS, AND THE CASE WAS SHIFTED FROM ALLEGED COMPLIANCE WITH THE POLICY ON THE PART OF THE INSURED TO LACK OF STATUTORY NOTICE BY THE INSURANCE COMPANY.

The defendant in error alleged in her complaint that the insured agreed in the policy to pay the annual premium of $3,770.00 in advance on the delivery of the policy, and each annual premium on the 24th day of September thereafter during the continuance of the contract; that he died September 12, 1893; that he performed all the terms and conditions of the contract on his part to be kept and performed to the date of his death. This latter allegation was controverted. The court instructed the jury there was no evidence that any premium save the one due on the delivery of the policy had been paid, but positive proof to the contrary. Defendant in error is seeking to recover a vast sum of insurance which was never purchased and for which no consideration was paid.

Mr. Pomeroy, in his work on *Remedies and Remedial Rights, Sec. 556*, says:

"The plaintiff is no longer permitted to aver the performance of the required act, and on the trial prove the circumstances which excuse such performance, or prove any other alternative than the one specially alleged."

She shifted her case from alleged compliance with the contract of insurance to an unpleaded failure on the part of the insurance company to give a certain notice required by the statute of New York. To have maintained a right of recovery under this statute it should have been pleaded.

Austin v. Goodrich, 49 N. Y. 366.
Churchill v. Onderdonk, 59 N. Y. 134.
Railroad Co. v. Sturgis, 44 Mich. 538; 7 N. W. 213.

CAN RECOVERY BE HAD ON A POLICY OF INSURANCE WITHOUT FIRST PAYING, OR OFFERING TO PAY, DELINQUENT AND UNPAID PREMIUMS?

The opinion of a majority of the court in the case of *Baxter v. Brooklyn Life Ins. Co., 119 N. Y. Rep., 450*, and cases adopting it, was followed as authority for a recovery of the insurance without first making payment or tender of delinquent premiums. The decision in that case was by a divided bench of four judges in favor and three in opposition. Andrews, J., with whom Earle and Gray, JJ., concurred, insisted that the payment or proper tender of delinquent premiums was a necessary condition precedent. From his opinion we quote as follows:

"But it is a condition precedent to the maintenance of such action that the plaintiff must, before suit brought, have paid or tendered the premium unpaid. The plaintiff, under the statute of 1877, is not required as before to show that it was

paid or tendered on the day fixed in the policy, but he must aver and prove that payment was made at some time before the action was commenced, or else no right of action has accrued. This is in accordance with the well-settled rule that in mutual promises the plaintiff seeking to charge the defendant, must aver and prove performance on his part of that which was the consideration of the defendant's promise, and this as well where the promise of the plaintiff was to be performed before the day fixed for performance by the defendant, as where the performances of respective promises were concurrent and dependent."

Loud v. Land Co., 153 U. S., 564.
Phillips Co. v. Seymour, 91 U. S., 646 (650).

There might be some more plausible ground for violating this rule of law and practice in states where the distinctions between law and equity are abolished than in the federal courts wherein such distinctions are definitely preserved.

This court has said concerning the nature of such a contract:

"It is an entire contract of life insurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. * * * Each installment (premium) is, in fact, part consideration of the entire insurance for life. It is the same thing where annual premiums are spread over the whole life. * * * The whole premiums are balanced against the whole insurance."

Ins. Co. v. Statham, 93 U. S., 24 (30).
See also Kellner v. Ins. Co., 43 Fed., 623 (627).

Notwithstanding the New York statute, therefore, and even if it be held applicable to this contract, there became due from Mr. Phinney to the company September 24th, 1891, the premium of $3,770.00, and another of like amount September

24th, 1892, and such premiums remained due at the beginning of this action.

Thompson v. Ins. Co., 104 U. S., 252 (260).
Insurance Co. v. Unsell, 144 U. S., 439 (447).

In the former of these cases, the court says:

"A fatal objection to the entire case set up by the plaintiff is, that payment of the premium note in question has never been made or tendered at any time. There might possibly be more plausibility in the plea of former indulgence and days of grace allowed, if payment had been tendered within the limited period of such indulgence. But this has never been done. The plaintiff has therefore failed to make a case for obviating and superseding the forfeiture of the policy, even if the circumstances relied on had been sufficiently favorable to pave the ground for it. A valid excuse for not paying promptly on the particular day, is a different thing from an excuse for not paying at all."

In the latter case, the beneficiary relied upon a waiver as excusing payment of the premium at the time the same was due and as defeating the right of the company's forfeiture; but there was evidence in this case that payment of the premium had been tendered subsequent to the due date. In discussing this question, Justice Harlan, at page 447, says:

"If the plaintiff had sued on the policies or certificates *without having paid or tendered the amount due to the company*, the nonpayment of which, at the time stipulated, was relied on to prove that the policies had become forfeited, that *fact would have been fatal to a right to recover, in any view of the case.*"

THE STATUTE OF NEW YORK DOES NOT APPLY TO A CONTRACT OF INSURANCE ENTERED INTO IN THE STATE OF WASHINGTON, AS DISCLOSED IN THE RECORD IN THIS CASE.

The question is presented in this case as to whether the

statute of New York cited in the petition has any application to a contract of insurance made, as this one, in the State of Washington.

The Mutual Life Insurance Company is shown to have been engaged in business in Washington, and in the course of and as a part of that business engaged in the contract in dispute. It cannot be asserted of a corporation, more than of a natural person, that it can only do business in the state of which it is a resident or citizen. The statute of New York is leveled at the business done in that state and applies its prohibitions alike to domestic and foreign corporations so engaged. Its language is "No Life insurance company doing business in the state of New York shall have power," etc.

Petition for Writ of Certiorari, p. 2.

This New York statute, therefore, not being one to regulate or determine the existence of New York corporations, but being one intended to apply to all corporations, both domestic and foreign, and only so far as they did business in New York, did not enter into and does not govern this contract made by this corporation, outside of that state.

U.S. Mtge. Co. v. Sperry, 24 Fed., 838; affirmed 138 U.S. 313.
White v. Howard, 38 Conn., 342 (461).
Ohio Life Ins. Co. v. Ins. Co., 11 Hump. (Tenn.), 24.
American Bible Society v. Marshall, 15 Ohio State, 543.
Bank of Louisville v. Young, 37 Mo., 407.
Vanderpoel v. Gorman, 140 N. Y., 563.
Warren v. The Bank, 38 N. E. Rep. 122, (Ill.)
Morawetz on Corporations, Secs. 967-968 (2nd Ed.)

The *United States Mortgage Company v. Sperry*, above cited, is particularly in point. The Mortgage Company was chartered by the State of New York, with power to loan money

upon real estate anywhere within the United States. Its charter prohibited its loaning money at a rate of interest exceeding the legal rate. The legal rate of interest, as established by the law of New York, was seven per cent per annum. It loaned money in the state of Illinois at ten per cent per annum, which rate was legal by the laws of that state, but illegal under the laws of the State of New York, and it was therefore contended that the rate of interest contracted for upon the Illinois loan was in violation of its chartered powers. The Supreme Court summarily disposes of this question, saying, at page 336:

"The general statute of New York had for its object to regulate the rate of interest upon loans there made, and not the rate upon loans made elsewhere. That state did not assume to fix the maximum of compensation to be paid to the lender for the use of money in other states. * * * When New York created the Mortgage Company, with power to loan money upon real estate anywhere within the United States, and prohibited it from lending money at a rate of interest 'exceeding the legal rate,' it did not intend to withhold from it the power to contract in other states, for interest upon moneys loaned, upon terms less favorable than those states permitted in respect to loans there made by other corporations, and by individuals."

The fact that this New York statutory regulation applies alike to foreign and domestic corporations transacting business in that state shows its provisions are not organic, entering into and becoming a part of the charters of New York corporations, but regulations within that state applicable to all corporations alike, and hence do not follow the domestic any more than the foreign corporation in its transactions beyond the state boundaries.

In *American Bible Society v. Marshall, 15 Ohio St., 545*, the court held that the New York statute of wills providing that "no devise of real estate to a corporation shall be valid unless

such corporation be expressly authorized by its charter or by statute to take by devise," had no effect beyond the limits of New York state. "It is not to be presumed," says the court, "that the legislature of that state intended to go further."

So in *White v. Howard, 38 Conn., 361*, where a similar question arose, the court said:

"Now this corporation stands at the bar of this court claiming the right to take lands within our territory by devise. It is clothed by such powers as have been conferred by its charter. Those, a portion of them, as we have seen, are to hold, purchase and convey real estate. It is not expressly authorized to take by devise, nor is it prohibited from so taking. Can it then take by devise? Not in New York, as we have seen. Therefore, not in Connecticut, say the counsel for the heirs at law, for being a New York corporation, and by the laws of that state devoid of power to take by devise, no argument is needed to show its inability to take by devise in Connecticut. This conclusion is too hastily drawn. If the inability to take by devise arose out of a prohibitory clause in the charter, the conclusion would be legal and logical. But the inability does not arise. There is no prohibition in the charter; the inability is created by the New York statute of wills expressly excepting corporations from taking by devise. Now this corporation brings with it from New York its charter, but it does not bring with it the New York statute of wills, and cannot bring it to be recognized as law within the jurisdiction. There is an obvious distinction between an incapacity to take, created by the statute of a state, which is local, and a prohibitory clause in the charter, which everywhere cleaves to the corporation. The reasoning is fallacious, not recognizing this distinction. There being no prohibition in the charter, and the power to hold and convey real estate being expressly given, we must look to our own statutes and laws, and not to those of New York, to determine whether or not this corporation can take by devise in Connecticut."

The second section of the New York statute (*Petition, p. 3*)

harmonizes with and gives additional strength to this view. This section provides, "The affidavit of any one authorized by section one to mail such notice * * * shall be presumptive evidence of such notice having been given."

A rule making a mere affidavit evidence would only apply in New York courts, and indicates the regulation is intended to be only of local application. The statute is dealing with the "doing of business in New York," and hence the propriety of making an affidavit *prima facie* evidence in a judicial proceeding in that state where the mailing of the notice was in issue.

The Mutual Life Insurance Company was chartered by a special act of the legislature of the State of New York, entitled, "An act to incorporate The Mutual Life Insurance Company of New York," of date April 12th, 1842. It is true the legislature reserved authority in the 18th section of the act to alter, amend or repeal it. It never exercised the authority except when it amended the act in April, ____, and in April, 1862, but in matters in no wise bearing on this case.

DOES THE GENERAL STATUTE OF NEW YORK RELATING TO THE BUSINESS OF LIFE INSURANCE COMPANIES AFFECT THE MUTUAL LIFE INSURANCE COMPANY CHARTERED UNDER A SPECIAL STATUTE OF THAT STATE?

Now, the question to be solved here is, whether the act, from which the present clause in the insurance law is taken, chapter 341 of the laws of 1876, and chapter 321 of the laws of 1877 (*Petition, pp. 2 and 3*), affects the Mutual Life Insurance Company. Certainly it does not alter its charter; certainly it does not decrease its power; certainly it cannot affect any of its rights under the contract which it made with the

state. It is in violation of statutory construction to hold that a special act of the legislature is altered, amended or repealed by general legislation, unless particular reference is made to the special act, or it is otherwise made clearly manifest that the special legislation was intended to be embraced within the general act. It may be subjected indeed to the general provisions of law under the police power which the state has a right to enact.

This company is required by the statute to send a notice of the coming due of each installment of premium to the policyholder or his assignee, and if the court finds it has failed to do so in this case, what is the consequence? It must pay the penalty. Is the State of Washington going to enforce the penal laws of the State of New York, and collect from its disobedient corporations the sums which they have been mulcted in, for doing or not doing something which the laws of New York require to be done or to be left undone?

The authorities holding that states will not enforce the penal laws of other states within their jurisdiction, are too numerous to cite. We cite only those which hold that the United States courts sitting in other states enforce only the laws of the states in which they are sitting, and will not enforce the penal laws of other states.

The Antelope, 10 Wheaton, 66.
Flash v. Conn, 109 U. S., 371.
Lyman v. B. & A. R. R. Co., 70 Fed. R., 409.
Huntington v. Attrill, 146 U. S., 657.
Texas v. Day Co., 41 Fed. R., 228.
Wisconsin v. Pelican Co., 127 U. S., 265.

We, therefore, argue that the general statute of New York respecting notice did not become a part of the charter of the in-

surance company and cleave to it going with it into other states and was not intended to affect either its being or its transactions outside New York.

American Bible Society v. Marshall, 15 Ohio St., 543.

MEANING OF THE STATUTE OF NEW YORK.—WAS IT THE INTENTION OF THE LEGISLATURE TO PROTECT THE AMOUNT OF THE POLICY FROM FORFEITURE, IF NOTICE OF UNPAID PREMIUM WAS NOT GIVEN, OR ONLY SUCH PORTION THEREOF AS PREMIUMS ALREADY PAID HAD PURCHASED?

If the New York statute applies to this case and the penalties of failing to mail the notice prescribed by that statute are visited upon the corporation, what is the punishment? A mutual life insurance company is a mutual association of which every policy owner is a member, the corporation being but the agent or trustee of this association of individuals. By taking a life insurance policy and paying the annual premium he enters into partnership. One of the members of the association was entitled to have a certain statutory notice mailed to him by some agent of the corporation stating the amount of such premium or interest due on the policy, the place where the interest or premium is to be paid, and the person to whom the same is payable, the notice to state that unless the premium or interest then due shall be paid to the company or duly appointed agent within thirty days after the mailing of the notice the policy will become forfeited and void. This notice is not deposited in the mail, but the member is otherwise fully possessed of all the information such notice can impart and so confesses. He fails to pay his premium, not for want of notice, but for want of money, and from that time forward suffers his premiums to go unpaid. Shall he, under such circumstances, make the want of formal notice, though possessed

of actual notice, his excuse for taking advantage of his own failure to mulct his associates in damages to the amount of his failure? Is such the intent of the legislature?

To construe a statute properly there should be an appreciation of the exact quality of the evil against which it was aimed, its extent, and its mischief. If the statute is a penal one, that is, if it forbids the doing of some act which otherwise it would be lawful to do, then it has to be strictly construed. If it is a remedial statute, then it is to be construed so as to bring about the remedy which the statute was intended to procure. But, above all things, the statute must be construed in a spirit of justice. It must not be extended beyond the remedy which is sought to be enforced, and particularly it is not to be extended so as to do injustice, or inconvenience, or absurdity. We are not to suppose that the legislature, in attempting to remedy a wrong, itself committed a greater wrong, or that in its attempt to remedy a hardship it has committed injustice.

Now let us look at this statute in the light of these principles. Contracts of insurance are made for the purpose of securing a principal sum to be paid on the death of the life insured, and, in order to secure this principal sum to be so paid annual, or semi-annual, or quarterly installments of premium are paid to the company. It is absolutely necessary, in order to conduct the business successfully, that such premiums should be so paid, and that they should be so paid on the day they are due, because life insurance takes into account not only the average of human life, but compound interest upon the installments which are paid. To leave out either element would destroy the scientific theory upon which life insurance is based. The contract is not for a fraction of a year, or from one installment period to another; although there is that sort of insurance, called "term insurance," and this statute ex-

pressly excludes that sort of insurance from its provisions. But the insurance for life is the insurance which we are now to deal with; and the policy before you in this case, which is the contract upon which the adjudication of this case is to be made, shows exactly what was to be done by both parties to the agreement. The contract is in two parts. One is a proposition in writing, made in Seattle, in the State of Washington, September 22, 1890, and signed by Guy Carleton Phinney, and addressed to The Mutual Life Insurance Company of New York. The statements made in that application are offered as an inducement to the company to grant the application for insurance; and the policy, when issued, recites that this application is the consideration for granting the policy.

The policy contains the following provision: "*If this policy shall become void by non-payment of premiums, all payments previously made shall be forfeited to the company except as hereinafter provided.*"

Now, here is the forfeiture which the statute refers to, this is the forfeiture which it is aimed against, and this is the forfeiture which the statute forbids the companies to enforce. What is it? It is not the right to make a contract with the company, or to continue a contract already in existence. The statute prevents the forfeiture. Of what? Why, of the premiums which have heretofore been paid on the policy, and of nothing more. There is nothing more to forfeit. To give such a construction to this statute as that, not only is the forfeiture waived, which in this case amounted to one year's premium, but that an effect shall be given to the policy the same as if the premiums were regularly paid on each succeeding installment day provided in the policy, would be to give it a construction contrary to reason and contrary to justice. It would be a violation of the rights of the insurance

company which is unnecessary in order to accomplish the non-forfeiture of the premiums. It is not necessary to go to this length in order to sustain the statute. The statute was intended to provide that notice should be given of the recurrence of the payments, so that the policy-holder should not be taken by surprise, or affected by forgetfulness, oversight or sickness, and thus prevented from paying his premium on the very day it was due. It was an extension by the statute of an equitable interposition to prevent the forfeiture. This cannot be construed to bring about a greater forfeiture than it was made to prevent. It cannot be construed, without violating reason and justice, to mean that the policy-holder was forever discharged from his obligation to pay the premium because of the failure of this notice. There is something to forfeit. There is an accretion in the hands of the company of the surplus paid on each succeeding year the policy has been in force, which is forfeited unless the premium is paid. And to make sure the payment of which, the clause of forfeiture was inserted in the policy. *It is to prevent that forfeiture that the statute was passed; and in this case one year's premium has been paid. To do equity between the parties, you must deduct from that one year's premium the cost of carrying the insurance for one year as if it were a term policy, and then the amount of surplus which remains in the hands of the company, and which by the contract it has power to forfeit but for the statute, would be the amount of the proper recovery in this case.* (See *Record, p. 336.*)

This is rendered clear by the decision of the Supreme Court of the United States in the case of the *New York Life Insurance Company v. Statham, 93 U. S., 24.* The policy in this case had become, by its terms, void, and the reserve, or surplus, in the hands of the company had been forfeited to the company in consequence of the condition of the country, being in a state of

war with the southern states. The court said it was not proper that the policy should be revived, nor that upon the policy-holder's offering the amount of the accrued premiums which had been withheld, together with interest thereon, the policy should be reinstated. Mr. Justice Bradley, on behalf of the court, exhibits not only his clear knowledge of equitable principles and their application to the ordinary affairs of life, but also his profound knowledge of life insurance. He says:

"There must be power to cut off unprofitable members, or the success of the whole scheme is endangered. The insured parties are associated in a great scheme; and unless there is power to end the risk as soon as the premiums end, the essential features, the mathematical calculations are all wrecked. Delinquency cannot be tolerated or redeemed, because, if one policy-holder, after having failed to pay his premium and allowed a considerable time to elapse before he attempted to reinstate himself, it would be only the policy-holder whose business would be unprofitable to the company who would so come back. The great mass of those who had defaulted would be able to get insurance cheaper somewhere else, and therefore they would not attempt to revive their policies, but would go out of the scheme altogether."

Says the court in that case: "Non-payment at the day involves forfeiture, if such be the terms of the contract." Then the court goes on to show that what there is in the hands of the company to be forfeited is surplus preminms over the amount which was necessary to carry the expired risk, and which is called in insurance circles the "reserve." That reserve is equitably the property of the insured; and when he is forced to go out of the company by the unforseen exigencies of war he is entitled to take that amount with him.

That is all that could have been forfeited under any circumstances by the contract. Now the statute comes in and says that the company shall not forfeit that, unless it gives notice,

This is a very different thing from saying that unless it gives notice the contract shall be continued to the end of the life of the party insured, and if at any time hereafter he shall die the whole amount of the insurance shall be paid over after deducting the back premiums. If he lived long enough to make those premiums equal to the amount of the principal sum, the company would never hear of him. If he died within a few years, as Phinney did in this case, then the company would hear of him as it has heard in this case, with a claim for the amount insured, without any attempt whatever to pay the premiums which are confessedly unpaid and in arrears. No legislature could ever have meant such injustice. There must be some limit to the time of rehabilitation. To prevent a forfeiture is not to decree a continuance of the contract all on one side, with no payments on the other. There is no language in the statute which will bear the construction that it was intended to apply to more than one failure to pay premium.

This statute is, as we have shown elsewhere, highly penal as regards the company. The penalty cannot be exacted more than once while the first overdue premium remains unpaid. The statute was exhausted upon the failure to give the notice in September, 1891, and until the assured paid that premium he could not claim the benefit of the statute for the failure to give notice of the payment due a year after in 1892. This would be construing the statute as if it contained the language "that the company is forbidden to forfeit for each and every premium unpaid for which proper notice had not been given."

The penalty is inflicted upon the company solely to prevent the forfeiture by inadvertence, mistake or forgetfulness. It was not intended to release the insured from all future liability. There can be no continuous credit given for the premium on the ground of a continuous failure to give notice.

Fisher v. N. Y. C. & H. R. R. Co., 46 N. Y., 644.

In this case the legislature had forbidden railroad companies to charge more than two cents a mile for passengers, and inflicted a penalty of fifty dollars for disobeying the law. A passenger rode again and again upon the railroad and then sued for the accumulation of penalties, but the Court of Appeals held that only one penalty could be recovered. If, after suit was brought for the first penalty, the company did not avail itself of the notice and cease its illegal action, a suit might be brought for another, but in the quaint language of Judge Grover, who wrote the opinion, people should not be permitted to keep a "book account" of penalties.

In this case, had we been informed of the failure to give notice, we could promptly have corrected the omission, but then Mr. Phinney would have had to pay the premium within thirty days, which is just what he wanted to avoid.

CONCLUSION.

Certiorari is a permissible remedy in a case like the one here presented. We have cited as alike in principle the case of *Wabash Western Railway v. Brow, 164 U. S., 271.* We further call attention to *Saltonstall v. Birtwell, 164 U. S., 54,* wherein, it having been held that the right of an importer to recover excessive duties exacted could not be recovered unless it was shown protest had been made at the time of payment, (though made afterwards and within ten days after the ascertainment and liquidation of duties), and the judgment being affirmed by the Circuit Court of Appeals, this court granted a writ of certiorari.

While in the case of "*The Kate,*" *164 U. S. Rep., 458,* certain questions being certified to this court, it caused the whole record to be brought up in order to determine a case involv-

ing, as we apprehend, questions of less gravity and less importance, and tending less to establish uniformity of decision than the case at bar.

Telfener v. Russ, 162 U. S. Rep., 170, was an action by Russ, the holder of a contract to purchase large tracts of land from the State of Texas, against Telfener, to whom he had sold and assigned his contract, upon an alleged breach of the contract of assignment. A writ of certiorari was issued to the United States Circuit Court of Appeals for the Fifth Circuit.

So, also, in *Dashiell v. Grosvenor, 162 U. S. Rep., 425,* a patent infringement case where the decision of the Circuit Court of Appeals is final, as in the other cases cited.

The prayer of the petitioner invokes as an alternative relief to that of the writ of certiorari, the granting of a writ of mandamus. We were influenced to pursue this course by the seeming approval, or rather the lack of adverse criticism, in the case of *American Construction Company v. Jacksonville, Tampa & Key West Railway Co., 148 U. S. Rep., 372,* where such a method was adopted. In that case a writ of certiorari was granted. Jurisdiction of the Circuit Court being based upon the diverse citizenship of the parties, judgment of that court is final, and for that reason the relation of this court to the Circuit Court of Appeals would not be that of an appellate or supervising tribunal. The general power to issue a writ of mandamus requiring the inferior court to take jurisdiction of a cause which it has improperly refused to entertain does not apply.

In re Atlantic City Railroad, 164 U. S. Rep., 633.

Regarding the large amount involved in this litigation, the deprivation of the right of appeal by the dismissal of the writ of error, differences of judicial opinion respecting a number of

the questions raised and the unsettled rule as to a number of other questions presented, as well as the importance of a decision affecting numerous other outstanding policies of the Mutual Life Insurance Company of New York, and other life insurance companies similarly circumstanced, it is respectfully urged that a writ of certiorari be issued out of this Honorable Court to bring the record and cause before it in order that it may decide the entire matter in controversy as if the case had been brought before the court by writ of error; or, as an alternative, in case a writ of mandamus be regarded the proper relief, that such writ may issue out of this court requiring the Circuit Court of Appeals for the Ninth Circuit to reinstate the case and adjudge it according to law and the right thereof.

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